BEFORE THE ARIZONA CORPORATION COMMISSION

JIM IRVIN
Commissioner-Chairman
TONY WEST
Commissioner
CARL J. KUNASEK
Commissioner

IN THE MATTER OF THE PETITION MCIMETRO ACCESS TRANSMISSION SERVICES, INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS, AND CONDITIONS PURSUANT TO 47 U.S.C. §252(b) OF THE TELECOMMUNICATIONS ACT OF 1996	DOCKET NO. U-3175-96-479 DOCKET NO. E-1051-96-479
IN THE MATTER OF THE PETITION OF AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS AND CONDITIONS WITH U S WEST COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. § 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996	DOCKET NO. U-2428-96-417 DOCKET NO. E-1051-96-417 **AT&T AND MCIW'S RESPONSE TO U S WEST'S APPLICATION FOR EXPEDITED STAY OF DECISION 60353**

AT&T Communications of the Mountain States, Inc. ("AT&T") and MCI WorldCom, Inc., on behalf of its regulated subsidiaries, including MCImetro Access Transmission Services, Inc. ("MCIW) hereby respond to the Application of U S WEST Communications, Inc. for Expedited Stay of Decision No. 60353 ("Application for Stay"). U S WEST Communications, Inc.'s ("U S WEST") Application for Stay should be denied because the request for relief is inconsistent with federal and state law and representations made by U S WEST.

I. INTRODUCTION

U S WEST seeks an *expedited* stay of Decision No. 60353, a decision that was issued on August 27, 1997, or over 18 months ago. Nothing raised in U S WEST's Application justifies staying Decision No. 60353. To the contrary, the recent Supreme Court decision in *AT&T Corp. v. Iowa Utils. Bd.*[1] confirms the correctness of this Commission's Decision No. 60353.

On July 31, 1997, the Commission approved AT&T's and MCW's Interconnection Agreements with U S WEST, subject to arbitration of the issue of combination of unbundled network elements ("UNEs) and whether basic residential and business service, or any other furnished service, could be requested as UNEs in combination.[2] These matters were arbitrated and decided by the Commission on August 29, 1997, in Decision No. 60353. The Commission ordered that specific language be incorporated into both the AT&T and MCIW Interconnection Agreements that required U S WEST to provide network elements on an individual and combined basis, and prohibited U S WEST from separating network elements that are currently combined.[3]

On October 24, 1997, U S WEST filed an Application for Expedited Relief from Order of U S WEST Communications, Inc. ("Application for Expedited Relief"). U S WEST asked the Commission to issue an order "relieving U S WEST from the obligations imposed by the Commission Decision No. 60353, requiring U S WEST to combine unbundled network elements for AT&T and [MCIW]."[4] U S WEST argued that since the Eighth Circuit vacated Rule 315(b),

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[1] 119 S. Ct. 721 (1999) ("*Iowa Utils. Bd. III*").

[2] *Petition of AT&T Communications of the Mountain States, Inc. for Arbitration of Interconnection Rates, Terms and Conditions Pursuant to Section 252(c) of the Telecommunication Act of 1996*, Docket Nos.U-2428-96-417 and E-1051-96-417, Decision No. 60308, Order (July 31, 1997) ("AT&T Arbitration"); *Petition of MCImetro Access Transmission Services, Inc. for Arbitration of Interconnection Rates, Terms and Conditions Pursuant to Section 252(c) of the Telecommunication Act of 1996*, Docket Nos.U-3175-96-479 and E-1051-96-479, Decision No. 60308, Order (July 31, 1997) ("MCIW Arbitration").

[3] AT&T Arbitration and MCIW Arbitration, Decision No. 60353 at 8.

[4] AT&T Arbitration, Application for Expedited Relief at 1.

which was the basis of the Commission's decision, the Commission should relieve U S WEST of its obligations under the Interconnection Agreement to combine network elements, provide combinations of network elements and not separate existing combinations of network elements.[5] AT&T responded to the Application for Expedited Relief, arguing that U S WEST ignored the change-of-law provisions of the Interconnection Agreement and that federal and state law supported the provisions in the agreement.[6] The Commission has not issued a ruling on U S WEST's Application for Expedited Relief.[7]

On January 25, 1999, the Supreme Court issued its opinion, overturning the Eighth Circuit's decision and reinstating Rule 315(b). That decision, *Iowa Utils. Bd. III,* left no doubt that it was completely reasonable and lawful for the FCC to require incumbents to provide access to preassembled network elements.[8] *Iowa Utils. Bd. III* unequivocally rejected the legal argument made by U S WEST in its Application for Expedited Relief.

Now, for the second time since the Commission issued Decision No. 60353, U S WEST seeks expedited relief without further proceedings. The latest arguments U S WEST has made to justify circumventing its obligations under the Telecommunications Act of 1996 ("Act"), Federal Communications Commission's ("FCC") regulations implementing the Act, and this Commission's orders are unpersuasive, lack merit and should be disregarded.

U S WEST's Application for Stay essentially rests on the following arguments: 1) Rule 51.315(c)-(f), which required U S WEST to combine network elements for competitive local

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[5] *Id.*, at 2. On October 14, 1997, the Eighth Circuit issued its Order on Petitions for Rehearing, vacating Rule 315(b).

[6] AT&T Arbitration, AT&T's Response to U S WEST's Application for Expedited Relief from Order. For a brief description of AT&T's arguments, *see* Summary of Argument at 2-3. A copy of AT&T's Response, without attachments, is attached hereto as Exhibit A.

[7] The parties asked the Hearing Division to defer any ruling on the Application for Expedited Relief until the Supreme Court issued its opinion on Rule 315(b). U S WEST makes no mention of the Application for Expedited Relief in the latest Application, nor has it withdrawn the Application for Expedited Relief.

[8] *Iowa Utils. Bd. III,* 119 S. Ct. at 736-737.

exchange carriers ("CLECs"), were vacated by the Eighth Circuit and "the Supreme Court left intact the Eighth Circuit's decision invalidating these rules";[9] and 2) because the Supreme Court vacated Rule 319, the FCC's list of network elements, U S WEST does not know which combinations it is prohibited from separating. For these reasons, U S WEST submits that "the Commission should stay Decision No.60353 to the extent it creates any obligation on the part of U S WEST to combine network elements for AT&T and [MCIW]."[10] Additionally, U S WEST argues that the Commission's decision eliminates the distinction between access to unbundled elements and resale and violates Section 251 of the Act. The Commission should reject each of U S WEST's arguments.

II. ARGUMENTS

A. UNE Combinations v. Resale

U S WEST argues that "Decision No. 60353 and the resulting interconnection agreements require U S WEST to combine elements ordinarily combined in its network in the manner they are typically combined. Providing these combinations also violates Section 251 of the Act and undermines the distinction between resale and unbundled elements."[11] U S WEST's argument is without merit and has finally been laid to rest by the Supreme Court.

> When Rule 315(b) is added to [TELRIC pricing and Rule 319], a competitor can lease a complete, pre-assembled network at (allegedly very low) cost-based rates.
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> • • •
>
> The incumbents argue that this result is totally inconsistent with the 1996 Act. They say that it not only eviscerates that distinction between resale and unbundled access, but that it also amounts to Government-sanctioned regulatory arbitrage. . . .

[9] Application for Expedited Stay at 3.
[10] *Id at 10.*
[11] Application for Expedited Stay at ¶ 7.

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> The reality is that § 251(c)(3) is ambiguous on whether leased network elements may or must be separated, and the rule the Commission has prescribed is entirely rational, finding its basis § 251(c)(3)'s nondiscrimination requirement. It is true that Rule 315(b) could allow entrants access to an entire pre-assembled network. In the absence of Rule 315(b), however, incumbents could impose wasteful costs on even those carriers who requested less than the whole network. It is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice.[12]

The incumbent LECs argued at the Supreme Court that requiring them to provide combinations obliterates the distinctions between access to network elements and resale. The Supreme Court found Rule 315(b) "could allow entrants access to the entire pre-assembled network," but found this to be "entirely rational." There is no longer any basis for, or merit to U S WEST's argument that combinations of network elements violate Section 251 of the Act or "undermines the distinction between resale and unbundled network elements."

B. Rule 319 -- List of Network Elements

U S WEST argues in its Application for Stay that the Supreme Court vacated Rule 319, and until the FCC issues new rules, "there is no current, valid unbundling standard against which U S WEST can judge a request to provide a currently-connected-combination-of-elements."[13] U S WEST's argument ignores the provisions of the Interconnection Agreement and its prior representations to the FCC and Ninth Circuit Court of Appeals.

Section 1.1 of the Interconnection Agreement states that U S WEST shall provide network elements in accordance with the terms of the Interconnection Agreement. The

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[12] *Iowa Utils. Bd. III* at 737-738. *See also Id.* at 736. ("We agree with the Court of Appeals that the Commission's refusal to impose a facilities-ownership requirement was proper.")

[13] Application for Expedited Stay at 5.

Interconnection Agreement describes the "initial set"[14] of network elements: loop, network interface device, distribution (subject to bona fide request), local switching, operator systems, shared transport, common transport, dedicated transport, signaling link transport, signaling transfer points, service control points/databases, tandem switching, 911 and directory assistance. U S WEST has represented to the FCC that it will honor existing contracts: "U S WEST will honor existing contracts with respect to the availability and pricing of unbundled network elements until the FCC adopts its order setting forth new interconnection rules, network elements definitions and ILEC obligations."[15] U S WEST has also represented to the Ninth Circuit Court of Appeals that it will provide the network elements contained in approved Interconnection Agreements with AT&T.

The FCC agrees with AT&T and MCIW that the network elements identified in the Interconnection Agreement cannot be separated, unless requested by AT&T and MCIW.

> U S WEST states in its Answering Brief at 13 that, until the FCC's new unbundling rules come into effect, it "will provide unbundled network elements as set for in its agreement with AT&T." Consistent with the FCC's combinations rule, U S WEST therefore may not separate any already combined elements that it provides to AT&T pursuant to the Agreement, unless AT&T so requests.[16]

It is disingenuous for U S WEST to say there is no list of network elements it is required to combine or is prevented from separating. The Interconnection Agreement provides such a list, and U S WEST has represented to the FCC and Ninth Circuit Court of Appeals that it will honor the list until a new rule is adopted by the FCC.

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[14] *See* Sections 2.8 and 2.9. The network elements identified in Section 2.7 are not all the possible elements. AT&T may identify and request additional network elements through the bona fide request process.

[15] Letter dated February 11, 1999, from Mr. Bruce K. Posey, Senior Vice President, Federal Relations and Regulatory Law, and Ms. Katherine L. Fleming, Acting Vice President, Interconnect Implementation, to Mr. Lawrence E. Strickling, Chief Common Carrier Bureau, Federal Communications Commission. A copy is attached as Exhibit B.

[16] Brief for the Federal Communications Commission as Amicus Curiae in Support of AT&T, *U S WEST v. AT&T, et al.*, Nos. 98-35789, 98-35828, 98-35829 (9th Cir. filed March 23, 1999) at 12.

U S WEST is obligated to provide network elements and has represented to the FCC and the Ninth Circuit Court of Appeals that it will provide network elements until the FCC adopts new unbundling rules. Therefore, there is no question what network elements U S WEST must provide, must provide in combination, and is prohibited from separating.

C. FCC Rule 315(b)

The legal obligation of U S WEST to provide combinations of network elements and to not separate network elements unless requested by the CLEC unquestionably is the law of the land.[17] It is frivolous for U S WEST to continue to argue that it need not provide UNEs in combination or can separate network elements against the wishes of the CLEC ordering elements that are presently combined.

D. FCC Rules 315(c)-(f)

U S WEST argues that Rules 315(c)-(f) are invalid and no longer subject to judicial review.

> Because no party petitioned for review of FCC Rules 51.315(c)-(f), the Supreme Court left intact the Eighth Circuit's decision invalidating these rules, which had previously required incumbent LECs to combine network elements for CLECs.[18]

U S WEST concludes that the Commission has no authority to order U S WEST to combine network elements or order that such language be included in the Interconnection Agreement. U S WEST is mistaken for a number of reasons.

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[17] *Id.* at 12, n.3. ("U S WEST argues that because Rule 319 has been vacated, enforcement of the combining rule would "conflict with federal law." U S WEST Answering Brief at 15. To the contrary, to fail to enforce Rule 315(b) would conflict with federal law, because the Supreme Court upheld the validity of that rule."); *Iowa Utils. Bd. III* at 737-738.

[18] *Id.* This issue is before the Eighth Circuit on remand. *See*, Response of Federal Respondents to Local Exchange Carriers' Motion Regarding Further Proceedings on Remand and Motion for Voluntary Partial Remand, and Intervenors' Response to Local Exchange Carriers' Motion Regarding Further Proceedings on Remand, No. 96-3321 (and consolidated cases) (8th Cir.).

First, the briefs filed by AT&T and other parties at the Supreme Court challenged the Eighth Circuit's jurisdictional holding and argued the Eighth Circuit improperly failed to apply the substantive standards of Section 201(b) when it vacated Rule 315(c)-(f) and other FCC rules.[19] Therefore, the statement that "no party petitioned for review of FCC Rules 51.315(c)-(f)" is simply not true.

Second, the Supreme Court did not leave "intact" the Eighth Circuit's decision invalidating Rules 315(c)-(f). The Eighth Circuit's analysis of the FCC's jurisdiction to promulgate rules implementing the Act started with a review of the FCC's pricing rules and the statutory provisions of the Telecommunications Act of 1996. The Eighth Circuit concluded that the FCC lacked specific statutory authority under Section 251 and 252 to adopt pricing rules. It subsequently determined that the FCC's general authority under Section 201(b) did not grant the FCC authority to implement its pricing rules. Having found that the FCC had no general authority under Section 201(b) to promulgate rules to implement the provisions of Sections 251 and 252, the Eighth Circuit looked for authority in Section 251 to promulgate Rule 315(c)-(f). Finding none, it vacated Rule 315(c)-(f).[20]

The Supreme Court's analysis began with a review of the FCC's authority to implement rules under Section 201(b). Contrary to the Eighth Circuit, the Supreme Court upheld the FCC's authority pursuant to its general rulemaking authority in Section 201(b) to promulgate rules to implement the Act, thereby reinstating the FCC's pricing rules, dialing parity rules, rules regarding state review of pre-existing interconnection agreements and rural exemptions.[21] In response to arguments regarding whether § 251(d) served as a jurisdictional grant to the FCC to

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[19] Petition for Writ of Certiorari, *AT&T Corp. v. Iowa Utils. Bd.*, No 97-826, at 13 and 18 (U.S. filed Nov. 17, 1997); Brief of Petitioners AT&T *et al.*, *AT&T Corp v. Iowa Utils. Bd.*, No 97-826, at 32-34 (U.S. filed April 3, 1998.
[20] *Iowa Utils. Bd. v. FCC*, 120 F. 3d. 753 and 813.
[21] *Iowa Utils. Bd. III* at 730 and 732.

promulgate rules implementing Section 251, the Supreme Court's stated that "[o]ur understanding of the Commission's general authority under § 201 render[ed] the debate academic."[22]

The Eighth Circuit vacated Rules 315(c)-(f), stating that they "cannot be squared with the terms of § 251(c)(3)."[23] It also found Rule 315(b) to be "contrary to § 251(c)(3)."[24] However, the Supreme Court upheld Rule 315(b). The Supreme Court concluded that under Section 201(b) the "FCC had rulemaking authority to carry out the 'provisions of the Act.'"[25] Moreover, the Supreme Court held that the FCC's interpretation of Section 251(c)(3) was "entirely reasonable" and Rule 315(b) was "entirely rational, finding its basis in § 251(c)(3)'s nondiscrimination requirement."[26] The same rational applied by the Supreme Court upholding Rule 315(b) applies to Rules 315(c)-(f).

The Eighth Circuit cannot blindly ignore the Supreme Court's decision and the rationale used by it to uphold the jurisdiction of the FCC to promulgate its rules.[27] The Eighth Circuit must now reconsider the rules it previously vacated under the standard of review prescribed for general grants of rulemaking jurisdiction such as Section 201(b), *i.e.,* whether the FCC's rules reasonably implement some provision of the Act, not whether the rule can be justified by the "plain language" of some statutory provision.[28]

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[22] *Id.* at 732.
[23] 120 F. 3d 813.
[24] *Id.*
[25] *Id.* at 730.
[26] *Id* at 737. Nondiscrimination is the principle relied on by the FCC for implementing Rule 315(b) and 315(c)-(f). Both sets of rules rest on the same findings. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug 8, 1996), ¶¶ 292-297.
[27] *See Crocker v. Piedmont Aviation, Inc.*, 49 F. 3d. 735, 740 (D.C. Cir.), *cert. denied*, 116 S. Ct. 180 (1995) ("Law of the case cannot be substituted for law of the land.")
[28] *Id.* at 730. *See, e.g.,* FCC v. *Pottsville Broad Co.*, 309 U.S. 134,138 (1940), *FCC v. National Citizens Comm. For Broadcasting*, 436 U.S. 775, 793-794 (1978) ("[I]t is now well established that this general rulemaking authority [in Section 303(r)] supplies a statutory basis for the Commission to issue regulations codifying its view of the public-

U S WEST has requested an expedited stay. However, U S WEST has not alleged that AT&T and MCIW are requesting that U S WEST combine network elements that are presently separated.[29] At some point, AT&T or MCIW may ask U S WEST to combine individual network elements that are not currently combined. Until they do, U S WEST cannot show the need for an expedited stay; and when they do, U S WEST can renew its request for a stay.

E. U S WEST's Request for Stay is Inconsistent with U S WEST's Section 271 Filing

U S WEST has represented in its Section 271 filing that it will continue to make available each of the network elements contained in the Interconnection Agreements.[30] U S WEST has also represented in its SGAT filing that it will provide network elements, although it defines many network elements as "ancillary services."[31] However, U S WEST also claims in its Application for Stay it has no obligation to combine those same network elements or provide combinations of those same network elements because the Supreme Court vacated Rule 319.[32]

U S WEST is obligated under Section 271 of the Act to provide nondiscriminatory access to network elements in accordance with the requirements of Section 251(c)(2) and 252(d)(1).[33] Therefore, U S WEST must provide nondiscriminatory access to network elements, as defined by the Act. It cannot evade this obligation by arguing there is no list of elements it must provide in combination because Rule 319 was vacated or by calling elements something else, and at the

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interest licensing standard, so long as that view is based on a consideration of permissible factors and is otherwise reasonable." *Id.* at 793.

[29] U S WEST is obligated to provide, and has represented that it will provide, individual network elements; and Rule 315(b) prohibits U S WEST from separating combined network elements, unless AT&T or MCIW requests. Therefore, there is no legal or factual basis for staying its obligation to provide UNEs, UNE combinations, or staying the prohibition on separating combined UNEs.

[30] *Supplemental Notice of Intent to File*, Docket No. T-00000B-97-0238 (March 25, 1999) at 22.

[31] Arizona SGAT, Docket No. T-0151B-99-0068 (Feb. 5, 1999) §§ 9.0 & 10.0.

[32] *Application for Expedited Stay* at 3.

[33] 47 U.S.C. § 271(c)(B)(ii).

same time argue it provides network elements in compliance with the requirements of Section 271.

Furthermore, the Supreme Court noted that the FCC promulgated Rule 315(b), "finding its basis in § 251(c)(3)'s nondiscrimination requirement."[34] Once again, U S WEST cannot claim it meets the requirement of Section 271 of the Act to provide *nondiscriminatory* access to network elements if the Commission stays its obligations under Decision No. 60353 and the Interconnection Agreement to provide network elements in combinations or to not separate network elements.[35]

U S WEST cannot have it both ways. It cannot obtain a stay of its obligations under the Act to provide nondiscriminatory access to network elements and claim in its Section 271 filing that it has met the obligations of Section 271(c).

III. CONCLUSION

U S WEST has not provided any facts or legal basis that warrant the issuance of an expedited stay. U S WEST has, however, ignored the law and its own representations to the FCC, the Ninth Circuit Court of Appeals and its Section 271 filing.

U S WEST is legally obligated to provide, and has represented that it will provide, the network elements contained in the AT&T and MCIW Interconnection Agreements. U S WEST is legally prohibited from separating network elements that are currently combined. It has not alleged that AT&T or MCIW has requested that U S WEST combine individual network elements that are currently separated. U S WEST's Application for Expedited Stay should be denied.

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[34] *Iowa Utils. Bd.* at 737.

[35] The Arizona Commission's Decision No. 60353 is based on the Act and Rule 315(b). Decision No. 60353 at 7-8.

The undersigned has been authorized by MCI WorldCom, Inc. to sign this Response on its behalf.

Respectfully submitted this 13th day of May, 1999.

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Exhibit A

BEFORE THE ARIZONA CORPORATION COMMISSION

JIM IRVIN
Chairman
CARL J. KUNASEK
Commissioner
RENZ D. JENNINGS
Commissioner

IN THE MATTER OF THE PETITION MCIMETRO ACCESS TRANSMISSION SERVICES, INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS, AND CONDITIONS PURSUANT TO 47 U.S.C. §252(b) OF THE TELECOMMUNICATIONS ACT OF 1996.	DOCKET NO. U-3175-96-479 DOCKET NO. E-1051-96-479
IN THE MATTER OF THE PETITION OF AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC. FOR ARBITRATION OF INTERCONNECTION RATES, TERMS AND CONDITIONS WITH U S WEST COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. § 252(B) OF THE TELECOMMUNICATIONS ACT OF 1996	DOCKET NO. U-2428-96-417 DOCKET NO. E-1051-96-417 **AT&T'S RESPONSE TO U S WEST'S APPLICATION FOR EXPEDITED RELIEF FROM ORDER**

INTRODUCTION

U S WEST Communications, Inc. ("U S WEST") has requested that the Arizona Corporation Commission ("Commission") relieve U S WEST of certain obligations under the interconnection agreements ("Agreements") entered into with AT&T Communications of the Mountain States, Inc. ("AT&T") and MCIMetro Access Transmission Services, Inc. ("MCI"). Those Agreements were previously approved by this Commission. U S WEST also requests that the Commission modify those

Agreements to make them consistent with the Eighth Circuit Court of Appeals' decision entered on October 14, 1997. For the reasons discussed below, either action would be entirely inappropriate for the Commission to undertake at this time, therefore, U S WEST's requests should be denied.

SUMMARY OF ARGUMENT

U S WEST's motion is both procedurally and substantively improper. The Agreement contains unambiguous language requiring any party seeking a modification to an agreement -- specifically including changes that are purportedly required by intervening judicial decisions -- to request renegotiations with the other party, and in the event such renegotiations are unsuccessful, to invoke other specified procedures. These provisions are unqualified, and plainly apply to U S WEST's request here.

Although the provisions of the Agreement neither require nor permit a case-by-case determination of whether the specified renegotiation and other procedures may be bypassed, those procedures are absolutely necessary here. U S WEST's proposal to simply delete the provisions relating to combinations of unbundled network elements is insufficient. Although U S WEST would prefer an agreement containing no provision for use by AT&T of combinations of network elements, both federal and state law require otherwise.

More specifically, with respect to federal law, the Eighth Circuit has rejected U S WEST's arguments and held that "a competing carrier may obtain the ability to provide telecommunications services entirely through an incumbent LEC's unbundled elements." Iowa Utilities Board v. FCC, 120 F.3d 753, 814 (8th Cir. 1997)(emphasis added). In the Agreements approved by this Commission, this right was to be

effectuated by the provisions requiring U S WEST to offer combinations of unbundled network elements. See Agreement Section 24.3. The Eighth Circuit has since vacated the FCC rule that supported those provisions. In doing so, however, the Court recognized the Act's requirement that unbundled elements be provided in a manner that allows requesting carriers to combine such elements and that this would require ILECs to provide CLECs with access to their networks. If U S WEST desires to modify the agreement in light of the Eighth Circuit's decision, it must propose provisions that implement its statutory duty to provide the elements in a manner that enables AT&T to combine them to provide service. Otherwise, the Agreement will not comply with federal law.

Second, AT&T believes that Section 24.3 of the current Agreement is supported by the pro-competitive provisions of Arizona law. U S WEST's argument that the Act and the Eighth Circuit's decision preempt Arizona law in this regard is simply incorrect. The Act preserves state law that is not "inconsistent" with the Federal Act, and a rule authorized by state law requiring U S WEST to provide combinations of unbundled elements supplements the Act, it does not displace it. This Commission should thus consider, either here or more appropriately in a proceeding conducted in accordance with the Agreement, these state law claims.

BACKGROUND

I. STATUS OF AGREEMENT

This Commission has finalized its review and approval of the Agreements between U S WEST and AT&T and MCI. In its Order dated July 31, 1997, it finally approved the

entire Agreements, with the exception of the provisions relating to combinations of unbundled network elements. In doing so, it stated:

> THEREFORE, IT IS ORDERED that the Commission hereby approves the interconnection agreements, except as stated in Findings of Fact No. 10....IT IS FURTHER ORDERED that this Decision shall become effective immediately.

On October 6, 1997, the Commission completed its review and approval of the contractual provisions relating to combinations of elements and entered an Order finally approving amendments relating to those issues. The Order incorporated the Eighth Circuit's vacation of FCC Rules 51.315(c)-(f), but left in place provisions consistent with Rule 51.315(b) which required U S WEST, prior to the Eighth Circuit's October 14 vacation of this Rule, to provide AT&T with the same combinations of elements that it uses itself. In issuing its Order, the Commission, stated:

> IT IS THEREFORE ORDERED that the First Amendment dated September 25, 1997 to the Agreement for Local Wireline Interconnection and Local Service Resale between U S WEST and AT&T, executed on September 26, 1997, is in compliance with Decision No. 60353. IT IS FURTHER ORDERED that the Amended Agreement shall become effective immediately.

The contracting parties are free, under Section 252(e)(6) of the Federal Act, to challenge any portions of the Agreement that they contend conflict with Sections 251 and 252 of the Act. On September 17, 1997, AT&T sought review of the approved Agreement in the United States District Court for the District of Arizona pursuant to Section 252(e)(6) of the Federal Telecommunications Act of 1996 ("Federal Act"). On October 1, 1997, U S WEST filed counterclaims challenging portions of that same approved Agreement, including the specific provisions relating to combinations of unbundled network elements that it now asks this Commission to amend. (See Count III U

S WEST counter-claim). During the pendency of this appeal, the Agreement remains in effect until overturned by the court or revised following a remand back to the Commission from the Court. See Agreement Section 24.3.

Although U S WEST is under a current obligation to offer unbundled elements in combination, it has stated that it will refuse to do so. (See Motion for Expedited Relief, p. 4). Therefore, U S WEST is not currently being harmed by the provisions of the effective Agreement. If AT&T or MCI move this Commission to compel such performance, then the Commission retains jurisdiction to appropriately determine whether it will compel enforcement of the current provisions on combinations of unbundled network elements. Modification of the Agreement by the Commission at this time, however, would violate the express terms of the Agreement.

ARGUMENT

I. THE AGREEMENTS CONTAIN SPECIFIC PROCEDURES TO BE FOLLOWED IF AMENDMENTS ARE NECESSARY, AND THIS COMMISSION SHOULD HONOR THOSE PROCEDURES.

A. Effective Agreement Provisions

The Agreements approved by this Commission contain very specific procedures which the parties agreed to follow in the event that amendments to the Agreements are desired or, as U S WEST argues in this case, required due to a change in law or regulation. Each of the relevant amendment procedures were negotiated, agreed to by the parties, and approved by the Commission. Thus, this Commission should not assist U S WEST in its attempts to circumvent those agreed upon provisions. Specifically, Section 17.1 of the U S WEST/AT&T Agreement provides:

> [I]f either Party desires an amendment to this Agreement during the term of this Agreement, it shall provide written notice thereof to the other Party describing the nature of the requested amendment. If the Parties are unable to agree on the terms of the amendment within thirty (30) days after the initial request therefor, the Party requesting the amendment may invoke the dispute resolution process under Section 27 of this Part A of this Agreement to determine the terms of any amendment to this Agreement.

Any suggested amendments or modifications that occur by agreement of the parties or through the assistance of an arbitrator are ultimately sent to this Commission for its approval. See Agreement Section 27.

In addition, based on the parties' recognition that the law governing the Agreements may change, the Agreement contains procedures for accomplishing amendments that are directly required by a change in the law—again requiring negotiations between the contracting parties as a first step. Significantly, the Agreement specifically provides that the full and complete contract and all of its attendant obligations will remain in effect pending any renegotiation of the provisions in question. Section 24.3 of the Agreement specifically states:

> [I]n the event the Act or FCC or Commission rules and regulations applicable to this Agreement are held invalid, this Agreement shall survive, and the Parties shall promptly renegotiate any provisions of this Agreement which, in the absence of such invalidated Act, rule or regulation, are insufficiently clear to be effectuated, violate, or are either required or not required by the new rule or regulation. During these negotiations, each Party will continue to provide the same services and elements to each other as are provided for under this Agreement. Provided, however, that either Party shall give ten (10) Business Days notice if it intends to cease any development of any new element or service that is not at that time being provided pursuant to this Agreement. In the event the Parties cannot agree on an amendment within thirty (30) days from the date any such rules, regulations or orders become effective, then the Parties shall resolve their dispute, including liability for noncompliance with the new clause or the cost, if any, of performing activities no longer required by the rule or regulation during the renegotiation of the new clause under the applicable procedures set forth in Section 26 [dispute resolution] herein (emphasis added).

U S WEST, in direct contravention of the above terms of the Agreement, has not even requested negotiations with AT&T.[1] Instead, it has elected to disregard the terms of the effective and binding Agreement and go directly to this Commission for relief. To entertain U S WEST's request would be to make a mockery of the finalized Agreements, and to set a precedent encouraging parties to circumvent the explicit terms of the Agreements and to seek the Commission's assistance each and every time any court, the FCC, or any other governing body makes a decision that could potentially affect the terms of the Agreement. Recognition of the amount of time and resources that would be required for the Commission to play such a role, and the complexity of amendments that may be required to the Agreement, are precisely the reasons for including provisions in the Agreement requiring the parties to attempt to discuss and narrow any disputed issues before bringing potential modifications to the Agreements to the Commission for resolution.

This Commission should respect and uphold the integrity of the Agreement which the parties negotiated and arbitrated, and which this Commission approved. As noted above, in the event the parties are unable to agree on appropriate amendments, dispute resolution processes are available and specifically contemplated under the Agreement.

B. The Agreement as Modified by U S WEST's Proposal Would Not Comply With Federal Law.

The clear and unchanged state of the federal law requires U S WEST to provide nondiscriminatory access to unbundled network elements to AT&T so that AT&T can

The clear and unchanged state of the federal law requires U S WEST to provide nondiscriminatory access to unbundled network elements to AT&T so that AT&T can combine those elements to provide a finished service. 47 U.S.C. Section 251(c)(3). Moreover, the Eighth Circuit expressly affirmed that a carrier ordering unbundled elements "is entitled to gain access to all of the unbundled elements that, when combined by the requesting carrier, are sufficient to enable the requesting carrier to provide telecommunications services." Iowa Utilities Board, 120 F.3d at 815; see also id. at 814 ("[T]he plain language of subsection 251(c)(3) indicates that a requesting carrier achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent LEC's network.")

In making its findings, the Eighth Circuit noted that the "fact that the ILECs object to this rule indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them." Iowa Utilities Board, 120 F.3d at 813. For the Agreement to comply with the Act, therefore, it must contain provisions ensuring that the elements are provided in a manner that enables new entrants to do the actual combining of those elements, including provisions relating to network access. Indeed, the Department of Justice has recently recognized that in order to satisfy its obligations under Sections 251 and 252 of the Federal Act, an incumbent carrier's Agreement with a new entrant must contain such detailed provisions. See Exhibit A attached hereto, pp. 16 - 25. U S WEST, however, has proposed no terms and conditions to replace Section 24.3 of the Agreement.

U S WEST requests that this Commission simply relieve U S WEST of its obligations to provide network elements in combination by deleting a couple of

in the Agreement that deal with combinations. Such a requested modification has extremely far-reaching implications which cannot be disregarded or underestimated by this Commission. As the Department of Justice concluded:

> BellSouth's South Carolina revised SGAT is legally insufficient, because it fails to describe whether or how BellSouth will provide unbundled elements in a manner that will allow them to be combined by requesting carriers. First, the SGAT does not adequately specify what BellSouth will provide, the method in which it will be provided, or the terms on which it will be provided, and therefore there is no basis for a finding that BellSouth is offering "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252 (d)(1)" as the checklist requires. Second, BellSouth's application does not demonstrate that it has the practical capability to provide unbundled elements in a manner that would permit competing carriers to combine them. . . .
>
> The resolution of these issues, of course, may be enormously important to promoting efficient competitive entry. The most economically efficient means for CLECs to serve a large segment of customers in the foreseeable future may be through the use of combinations of unbundled elements, whether a CLEC uses only combinations of elements purchased from incumbent LECs, or uses such elements in conjunction with network elements of its own. . . .

In the Matter of the Application by BellSouth Corporation, et. al., "Evaluation of the United States Department of Justice, ("DOJ Recommendation") FCC Docket No. 97-208, November 4, 1997, pp. 19-20, 24.

As discussed above, it is impossible for an Agreement to be complete or to comply with the requirements of the Federal Act unless it clearly and unambiguously describes how AT&T will be allowed to provide services through combinations of unbundled elements. In other words, if this Commission determines that AT&T must itself combine elements that U S WEST has uncombined, a position AT&T contends would violate Arizona law, the Agreement must specifically provide how new entrants will (1) have access to U S WEST's network to obtain and combine those elements and realign

U S WEST'S networks and (2) under what terms and conditions (including price) those elements will be available. Simply deleting from the Agreement those provisions which oblige U S WEST to provide elements in existing combinations is not enough and would frustrate the purposes of the Federal Act regarding interconnection between the parties. Guidance from the Department of Justice details such requirements:

> BellSouth's South Carolina Revised SGAT states that BellSouth will perform, at no additional charge, software modifications that are "necessary" for the "proper functioning" of CLEC-combined elements, but it does not identify what translations are available under this provision or what the procedures are for obtaining these translations.
>
> . . .
>
> Even more fundamentally, the BellSouth South Carolina Revised SGAT does not even specify what combinations of network elements it proposes to separate and require the CLEC to combine, a defect that will make it exceedingly difficult for a CLEC to plan for the use of such elements. Even CLECs that plan to use some facilities of their own will need to purchase some "sets" of facilities and functionalities, and if it is not known whether they will be provided as a single element or in several pieces, it would not be possible for new entrants to plan their business. Moreover, this SGAT does not state what charges, if any, would be levied by BellSouth to modify existing elements so that they may be combined.
>
> While BellSouth South Carolina Revised SGAT appears to acknowledge the need for methods and procedures for providing unbundled elements in a manner that would allow them to be combined, the critical details are unspecified, and appear to be left largely as subjects for future negotiation. This approach, in our view, in inconsistent with BellSouth's obligation to offer specific and legally binding commitments with respect to its offering of unbundled elements.
>
> . . .
>
> In the absence of any record concerning the costs of practical implementation issues relating to alternative methods of providing unbundled elements so that they may be combined - indeed in the absence of any clear indication of how BellSouth itself proposes to fulfill this statutory requirement - we do not believe that BellSouth has demonstrated compliance with the checklist. . . .

DOJ Recommendation, pp. 21-23.

Similarly, because the Agreement previously contemplated that U S WEST would provide elements in combination if requested by AT&T, it contains no provisions for how U S WEST will uncombine or how AT&T will recombine those elements. Further, it provides no information regarding exactly how AT&T will gain access to the network to combine the elements U S WEST chooses to separate, such that lack of access does not become a barrier to AT&T's entry. In addition, the Agreement does not detail how customer outages and service quality concerns raised by the separation of elements will be eliminated or at least minimized. As the Commission can see, the parties have a number of details to work out before the Agreement can undergo any amendments and still provide AT&T access that will satisfy the requirements of the Federal Act. For this and the other reasons stated above, the Agreement's requirement that the parties attempt to work out these complex issues before coming to the Commission for approval or assistance is the only resolution that makes any sense.

II. ARIZONA LAW SUPPORTS THE AGREEMENT IN ITS PRESENT FORM AND REQUIRES THAT IT BE UPHELD.

A. Arizona law Requirements.

Arizona law, as well as the Federal Act, requires that U S WEST provide all new entrants with access to U S WEST's network on terms that are nondiscriminatory. 47 U.S.C § 251; A.A.C. §14-2-1307. An Agreement that would allow U S WEST to rip apart into pieces a network that it uses in combination, and then to require new entrants to

undertake the task of putting those pieces back together when U S WEST need not do the same in order to offer service, is surely discriminatory.

State law requires that local carriers provide facilities and services pursuant to approved agreements. A.A.C. §14-2-1307. Section 14-2-1306(C) requires that all local exchange carriers provide non-discriminatory access "that is at least equal in type, quality and price to that provided to themselves, to any affiliate, from any affiliate, or to another incumbent ILEC" to all "necessary network functions, databases, and service components required to provide competitive local exchange services." §14-2-1306(A),(C) (emphasis added).

In addition, "essential facilities" must be provided on equivalent terms and conditions to those the ILEC provides to itself. §14-2-1307(B) (emphasis added). Essential facilities are defined as those facilities or any "portion, component or function of the network" which are necessary for a competitor to provide service, that cannot reasonably be duplicated, and for which there is no adequate economic alternative to the competitor in terms of quality, quantity and price. Section 14-2-1302(8).

There can be no question that unbundled elements provided in combination, i.e., in the same way that U S WEST uses those elements, are necessary to satisfy Arizona's requirements of non-discriminatory access to U S WEST's network that is "at least equal in type, quality and price" to what U S WEST provides itself. In addition, unbundled elements in combination likely satisfy the requirement of "essential facilities" since they cannot be duplicated without additional excessive expense and effort by the new entrants, and can only be duplicated in a manner which would undoubtedly cause quality differentials to customers of the new entrant due to unavoidable interruptions of service.

This is particularly true since U S WEST has provided no information to AT&T regarding how AT&T will be allowed the access and information necessary to combine unbundled elements itself if the Agreement is ultimately modified. Therefore, this Commission has the authority, and indeed the obligation, under its own pro-competitive state laws to retain the provisions in the Agreement regarding combinations of elements.

B. This Commission is Not Preempted from Upholding under Arizona law the Provisions of the Agreement Challenged by U S WEST.

U S WEST attempts to argue that a finding by this Commission requiring U S WEST to provide elements to AT&T in combination would be "inconsistent" with the provisions of the Federal Act, and therefore, invalid under Section 261 of the Federal Act. This Commission should not -- and need not -- permit U S WEST to engage in blatantly anticompetitive conduct -- the sole purpose and effect of which would be to impose costs on competitive carriers that U S WEST does not incur, and to ensure that new entrants competing through the purchase of unbundled network elements are unable to provide service at parity with U S WEST. Contrary to U S WEST's claims, nothing in the 1996 Act prohibits Arizona from adopting and enforcing under state law duties that go beyond the minimal and non-exclusive requirements of the Act. Indeed, numerous provisions of the 1996 Act expressly permit the States to do so. For example, Section 261(c), entitled "Additional State Requirements," provides that:

> Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

Section 601(c) similarly states that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede . . . State, or local law unless expressly so provided in such Act or amendments" (emphasis added). The Act further reiterates this principle in the specific context of State review of interconnection agreements. Section 252(e)(3), entitled "Preservation of Authority," provides that a State Commission may "establish[] or enforc[e] other requirements of State law in its review of an agreement." And Section 251(d)(3), entitled "Preservation of State Access Regulations," states that the FCC:

> "may not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part."

U S WEST and other incumbent LECs have previously conceded that these very provisions preserve substantial State authority.[2] U S WEST nonetheless contends that any rule authorized by state law prohibiting it from taking apart network elements that are already combined is somehow preempted by the 1996 Act. But the Act itself completely rebuts any such claim. No provision of the Act "expressly" supersedes State law on this matter, see § 601(c), and preemption is inferred only "where Congress has legislated

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[2] See, e.g., Iowa Utilities Board v. FCC, No. 96-3321, Brief for Petitioners Regional Bell Companies and GTE at 24 (Nov. 18, 1996) ("Congress specifically preserved the authority of states to enforce any 'regulation, order, or policy' relating to LEC's intrastate access and interconnection obligations, so long as it is consistent with the requirements of section 251 and does not substantially prevent implementation of those requirements or the purposes of the Act's local competition provisions"); id., Brief of Mid-Sized Incumbent Local Exchange Carriers at 9 (Nov. 18, 1996)

comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives." Northwest Cent. Pipeline v. Kansas Corp. Comm'n, 489 U.S. 493, 509 (1989) (citations omitted). None of those conditions is met here.

To begin with, the many provisions of the Act expressly preserving State authority make it manifest that Congress did not intend for the 1996 Act to "occupy the field" of telecommunications regulation. To the contrary, the whole point of those provisions is to "leav[e] . . . room for the States to supplement federal law."

Nor is there any "conflict" between state law and federal law in this case. "[P]re-emption is not to be lightly presumed," California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987), and a conflict analysis must be "narrow and precise, 'to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role.'" Downhour v. Somani, 85 F.3d 261, 266 (6th Cir. 1996) (quoting Northwest Cent. Pipeline, 489 U.S. at 515). Indeed, to justify preemption, the asserted conflict must be particularly "sharp . . . where Congress legislates 'in a field which the States have traditionally occupied.'" Boyle v. United Technologies Corp., 487 U.S. 500, 507 (1988) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). And "[t]he principle is thoroughly established" that the State's power "is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled

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("Congress expressly chose not to preclude state regulations providing for local competition").

or consistently stand together.'" Kelly v. Washington, 302 U.S. 1, 10 (1937) (quoting Sinnot v. Davenport, 22 How. 227, 243 (1859)).

U S WEST's claims do not remotely satisfy the exacting standards required for preemption. A State requirement that imposes a more demanding and pro-competitive requirement on U S WEST than the federal Act plainly does not conflict with that Act. Such a requirement does not seek to relieve U S WEST from complying with any provision of the Act; rather, it reasonably supplements U S WEST's obligations in a manner that complements the purposes of the federal Act. Nor would such a requirement be an "obstacle" to achieving Congress' "objectives." To the contrary, it would only hasten accomplishment of the Act's central objective: to introduce competition into local exchange markets and "erode the monopolistic nature of the local telephone service industry." Iowa Util. Bd. v. FCC, 120 F.3d 753, 791 (8th Cir. 1997).

CONCLUSION

The Interconnection Agreements entered into with U S WEST by AT&T and MCI provide the exclusive means for how necessary amendments to the Agreements will be accomplished. Those Agreements are in effect and are binding, having been approved by this Commission, and the Commission should honor the parties' negotiated procedures for accomplishing amendments instead of prematurely inserting itself into the process. This is particularly true given the complexity of the amendments that will be necessary if any amendments are required at all. Further, those finalized Agreements are on appeal where U S WEST has asked the federal district court to resolve the same issues it now brings to this Commission. However, what is well-established and would serve as the best guide for this Commission's actions is its own state law requiring non-discriminatory treatment of

new entrants to promote local services competition. Reliance on those established policies and laws, which is entirely appropriate and not preempted by federal law, requires this Commission to take no action since the approved Agreements are completely consistent with those state mandates in their current form.

WHEREFORE, AT&T respectfully requests that this Commission deny U S WEST's request for expedited relief from the approved Agreements and for modification of the Agreements, and uphold the lawful Agreements in their present form.

RESPECTFULLY SUBMITTED this 6th day of November, 1997.

AT&T Communications of the
Mountain States, Inc.

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ORIGINAL AND TEN COPIES
of the foregoing hand-delivered for
filing this 6th day of November, 1997,
to:

Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, AZ 85007

COPIES of the foregoing hand-delivered
this 6th day of November, 1997, to:

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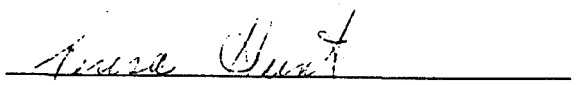

Exhibit B

276079

U S WEST, Inc.
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Bruce K. Posey
Senior Vice President - Federal Relations & Regulatory Law

Katherine L. Fleming
Acting VP - Interconnect Implementation

U S WEST

February 11, 1999

Mr. Lawrence E. Strickling
Chief of Common Carrier Bureau
Federal Communications Commission
1919 M Street NW, Room 500
Washington, DC 20554

Dear Mr. Strickling:

Following the Supreme Court decision in AT&T v. Iowa Utilities Board, 1999 WL 24568 (January 25, 1999) questions have arisen regarding the status of various interconnection rules, the appropriate definition of unbundled network elements and most importantly the status of existing interconnection obligations between the incumbent local exchange carriers and competitors seeking access to their networks.

U S WEST strongly believes an orderly process is necessary and in the public interest to avoid turmoil and uncertainty for both incumbents and new entrants while the 8th Circuit and the Commission address the full impact of the Supreme Court's decision. In an effort to offer a workable interim solution, U S WEST strongly urges the FCC to conduct an expedited rulemaking addressing the critical need to define and apply the "necessary and impair" standard and not to take any interim actions that would disturb the current relationships between U S WEST and its competitors while that rulemaking is in progress. U S WEST desires to provide stability for the FCC, its competitors and itself during this interim period. Therefore, while the FCC completes its anticipated rulemaking addressing these interconnection issues and related unbundling obligations and in the absence of interim rules, U S WEST commits to the following. First, U S WEST will honor existing contracts with respect to the availability and pricing of unbundled network elements until the FCC adopts its order setting forth new interconnection rules, network element definitions and ILEC obligations. Second, any new competitive carriers seeking interconnection during this period may opt into our existing contracts subject to appeals or dispute resolution. Also, U S WEST will extend the term of any contracts that are about to expire until the end of the year in order to allow time for the FCC's new rules to be in place.

Finally, U S WEST will continue to negotiate in good faith new interconnection agreements consistent with the terms of the Act.

Please contact us if you have any questions regarding these interim commitments in conjunction with our proposal.

Sincerely,

Bruce K. Posey
Senior Vice President
Federal Relations & Regulatory Law

Katherine L. Fleming
Acting Vice President
Interconnect Implementation